

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID MICHAEL NICHOLS,

Defendant-Appellant.

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UNPUBLISHED

September 15, 2009

No. 281878

Eaton Circuit Court

LC No. 07-020187-FH

Before: Jansen, P.J., and Fort Hood and Gleicher, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to two years' imprisonment for the felony-firearm conviction and three years' probation for the felonious assault conviction. Defendant appeals as of right, and we affirm.

Defendant lived with the victim, his ex-wife, and their son. After the couple's divorce, the victim purchased her own home, but allowed defendant to live with her when he needed a place to stay. In March 2007, defendant discovered that the victim was engaged in a relationship with her former boss, a married man. Defendant reportedly told the victim that he was happy for her and that he would move out of her home. However, the next day, his attitude changed. In the following weeks, defendant threatened to take custody of their son, to reveal the victim's relationship to the man's wife, and to reveal the relationship to the victim's employer.

On April 9, 2007, the victim was waiting for defendant to come home from the bar. She testified that he pointed a loaded gun at the back of her head. In the next three hours, defendant made various threats, terrorized the victim with the gun on four to five occasions, and forced the victim to call her former boss who was in Chicago on a business trip. Concerned with the tone of the telephone call received at approximately 2:00 a.m. during the workweek, the victim's former boss contacted a friend and co-worker of the victim who alerted police. The police arrived at the home, but defendant initially refused to come out. After voluntarily coming out through the garage, the police found defendant's weapon. Defendant's theory of the case was that the victim, her lover, and her friend falsified the assault crime to punish defendant for revealing the affair to the man's wife and to get defendant out of the victim's home. The jury convicted defendant as charged.

Defendant first alleges that the trial court erred in allowing the introduction of prior bad acts when the prosecutor failed to comply with the notice provisions. We disagree. The decision to admit evidence is within the trial court's discretion and will not be reversed absent an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). Error may not be predicated upon a ruling admitting evidence unless a substantial right of the party is affected and there is a timely objection offering a specific basis for the objection. MRE 103(a). The party opposing the admission of evidence must object at trial and specify the same ground for objection that he asserts on appeal. *People v Grant*, 445 Mich 535, 545, 553; 520 NW2d 123 (1994). Error requiring reversal cannot be predicated on error to which the aggrieved party contributed by plan or negligence. *People v Gonzalez*, 256 Mich App 212, 224; 663 NW2d 499 (2003). A party cannot obtain appellate relief when a defense theory has failed. That is, a party may not harbor error as an appellate parachute. *People v Carter*, 462 Mich 206, 214-215; 612 NW2d 144 (2000).

Review of the record reveals that the defense listed the spouse of the victim's suitor as a witness. In response, the prosecutor filed a motion to admit other acts evidence pursuant to MCL 768.27b. The prosecutor acknowledged that the motion did not provide 15 days notice to the defense, but asserted that the other acts evidence was known to the defense because of the personal protection order action (PPO). The defense filed a brief in opposition to the motion, noting that MCL 768.27b applied to domestic violence offenses, a crime not charged in the criminal action. However, at oral argument, the defense noted its intention to raise issues related to the PPO. Specifically, upon questioning by the trial court, the defense acknowledged its intention to admit the "overall situation" and the "precipitating factors" that led up to the date of the offenses. In light of the defendant's intention to "expand this trial," the trial court allowed the other acts evidence.

When trial commenced with the victim's testimony, the prosecutor did not ask any questions related to the PPO. However, on cross-examination, the defense questioned the victim regarding the content of the PPO. A claim of error cannot be predicated on evidence introduced or instigated by the defense to support his theory of the case. *Gonzalez, supra*. That is, the defendant cannot complain about the prosecutor's use of evidence to which the defendant "opened the door." *People v Lipps*, 167 Mich App 99, 108; 421 NW2d 586 (1988).<sup>1</sup> In light of defendant's intention to use the prior acts evidence and subsequent introduction of the evidence at trial to support his theory of the case, defendant's objection to the use of the evidence by the prosecutor and the lack of notice is without merit.

Defendant next asserts that he was denied the effective assistance of counsel. We disagree. The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich

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<sup>1</sup> We also note that in the trial court, the defense objected to the introduction of the prior acts evidence pursuant to MCL 768.27b. However, on appeal, defendant contends that the evidence was inadmissible pursuant to MRE 404(b), contrary to MRE 103(a) and *Grant, supra*.

575, 579; 640 NW2d 246 (2002). First, the court must find the facts and then determine whether those facts constitute a violation of the defendant's constitutional right to the effective assistance of counsel. *Id.* The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.* To establish ineffective assistance of counsel, the defendant must demonstrate: (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and (3) that the result of the proceedings was fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). The performance of counsel is based on an objective standard of reasonableness and recognizes the strategy of trial counsel without benefit of hindsight. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). Decisions regarding the evidence to present and whether to call witnesses are presumed to be matters of trial strategy. *Id.*

Following a *Ginther*<sup>2</sup> hearing on remand, the trial court denied defendant's motion for a new trial based on ineffective assistance of counsel. With regard to the 911 call defendant placed two weeks before the incident took place, the trial court held that there was no reasonable probability that the outcome would have been different as a result of the evidence. Defendant alleged that this telephone call reporting potential criminal activity established his innocent reason for bringing the gun into the home. However, the trial court noted that the gun was not brought into the home in proximity to the 911 call, and the 911 call did not negate the elements of the assault or make it less probable that the assault occurred. We cannot conclude that the trial court's factual finding and conclusions of law with regard to this issue were erroneous. *LeBlanc, supra*.

Next, defendant asserted that the telephone logs between the victim and her suitor and defendant and the suitor's wife should have been admitted to establish the proximity to the incident and to establish the conspiracy between the victim and her suitor. However, the trial court held that the telephone logs failed to improve the credibility of the retaliation theory,<sup>3</sup> involved a matter of trial strategy, and failed to create an outcome determinative error. The defense theory of the case was presented to the jury, and the absence of the telephone logs did not constitute outcome determinative error.

The failure to present the credit card records regarding the payment of defendant's trip to Florida by the victim does not provide defendant with appellate relief. At the *Ginther* hearing, the victim testified that she paid for the trip because defendant's credit cards were at the maximum level. Furthermore, the victim acknowledged at trial that she shared a bedroom with defendant fifty percent of the time and that he spent the rest of the time in the basement. There

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<sup>2</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

<sup>3</sup> Indeed, as presented during the *Ginther* hearing, in the three days before the incident, there were no telephone exchanges between the victim and her suitor. This documentary evidence weighed against the conspiracy theory.

was no indication that the victim asked defendant to leave her home. Thus, there was evidence of the victim's voluntary relationship with defendant introduced at trial.

Lastly, defendant alleged on remand that counsel was ineffective for failing to call a firearms expert to contest the victim's testimony regarding the loading and unloading of the gun and for failing to call defendant to testify at trial. However, at the *Ginther* hearing, the firearms expert acknowledged that he was not notified of the victim's version of events.<sup>4</sup> Additionally, trial counsel explained that defendant was arrogant and rambling during mock examinations prior to trial. The trial court held that the expert testimony would not have aided the defense. Additionally, the trial court held that defendant demonstrated his arrogance by challenging the prosecutor during the *Ginther* hearing and rambled to such an extent that both the prosecutor and defense counsel had to cut him off. In light of these factual findings, defendant has failed to demonstrate entitlement to appellate relief. *LeBlanc, supra*.

Affirmed.

/s/ Kathleen Jansen  
/s/ Karen M. Fort Hood  
/s/ Elizabeth L. Gleicher

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<sup>4</sup> We also note that trial counsel investigated the mechanics of the gun with his investigator and another officer. In light of the fact that the victim testified that she avoided the gun and did not handle guns, trial counsel noted that an attack to the victim's testimony would not be beneficial.